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In the

SUPREME COURT OF THE UNITED STATES

H. W. FERGUSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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STATEMENT AND ARGUMENT

The government's attorneys in their brief state categorically: "Petitioner had a fair trial and the verdict of the jury is supported by ample evidence. No question of importance is presented . . . " (Br. 12.)

In the last ditch, petitioner still believes that he did not have a fair trial and that, consequently, a question of importance is presented.

From studying the facts involved and the trial court's charge to the jury upon them, it is manifest that defendant was convicted by the trial judge rather than the jury. The jury was in effect instructed to find "guilty."

Petitioner believes it always is important that justice be done. Since he is the person most profoundly affected by this injustice, he deems this injustice doubly important. The Circuit Court of Appeals concluded a similar "fair trial" unfair, that the District Judge had faltered and erred in his charge to the jury, that possible civil liability should not be the basis of criminal responsibility.

The facts—rather than the government's case—may be summarized briefly. (For they are important in showing how the trial court's conception of the law relating to them and his misconception of the facts themselves prevented petitioner from receiving fair trial.)

The land bank of which petitioner was president held a note of Carrie Berkman secured by a mortgage on her farm in Nueces County, Texas. (R. 29, 90, 91.) The loan became delinquent, and the bank pressed for payment. (R. 25, 72, 413.) She offered to surrender the land for the debt, (R. 29) but the bank (through petitioner) refused. (R. 30.) Thereupon, Mrs. Berkman offered to pay $1,000.00 and give a deed to the property in cancellation of the indebtedness. (R. 33.)

Upon receipt of her offer petitioner did either one of two things, there being directly conflicting evidence upon his action. (R. 415, 416, 417-239, 240, 241.) The crux of the case—guilt or innocence—should have been the finding by the jury upon what petitioner in this situation actually did.

The government contended in the trial that Ferguson told the bank's lawyer to accept this proposition of Mrs. Berkman's but to have her deed the property to a nominee of the bank. (R. 239.) Consequently, when this was done the property would be the bank's. The bank's lawyer, whom Ferguson had discharged several months prior to the indictment, so testified.

Ferguson contended, on the other hand, that he told the bank's lawyer that the bank did not want the land; but, since there was a fair chance of profit by paying up the delinquencies and taking title, he wanted his wife to take the risk. (R. 415, 417.) (Looking forward from this point of time the proposition was a business risk Ferguson did not think the bank ought to take (it already owned $2,000,000.00 worth of land), but which risk he was willing that his wife should take, her money being in the market for investment.) Ferguson testified that he told the bank's discharged lawyer, Charles McCombs, to accept the proposition if Mrs. Berkman would deed the property to S. K. Fowler for his wife's benefit, that she would put up the money to pay delinquencies due the bank and back taxes. (R. 417.) Witness, John Pope, corroborated Ferguson's testimony that the bank's lawyer knew all about the trans-

action, had told him so, *had told him that Fowler held in trust for Mrs. Ferguson.* (R. 288, 289.)

The bank gave Mrs. Berkman her release. Mrs. Ferguson paid the taxes and the delinquent interest on the loan, (R. 420) and later the bank's loan was paid off in full. (R. 135.)

As Ferguson thought, the land proved a good investment. Profit was made from an oil lease and the eventual sale of the property. (R. 329, 334, 335.) (It was Ferguson's contention that had he been wrong about the quality of the investment, he never would have been indicted.)

The factual question for the jury to decide was whether the bank's lawyer that Ferguson had discharged was telling the truth or whether Ferguson was telling the truth; that is, whether Ferguson told the lawyer that Fowler was to hold title for Ferguson's wife, or whether Ferguson told the lawyer that Fowler was to hold title for the bank.

Such was the question of fact the trial judge should have presented to the jury!

He did. But he *answered* the question as well! It is of his answer that petitioner bitterly and strenuously complains.

The District Judge charged the jury:

> "Therefore, one of the questions involved here, which must be determined by the Court or you, is, whose money was it? Did it belong to the bank? When Mrs. Berkman conveyed that property, for the purpose of relieving herself of liability for her debt,

was she conveying it to someone to take under control and direction by the bank, or was she conveying it to someone to have and to hold for himself, or someone else?

"Fowler never asserted any title to it, therefore he never functioned as a vendee in the transaction. There is no contention that he was a bona fide purchaser. He was either the nominee, or in a sense trustee for the equity or the profits that might flow from that land, for the bank or for the defendant Ferguson, or defendant's wife, Mrs. Ferguson. Somebody had to constitute him trustee, and he held the thing in trust for somebody.

"The defendant Ferguson was President of the bank, and as such was without power to take anything that was the bank's and name somebody as trustee to hold it for him personally, or for his wife." (R. 464-465)

The first paragraph of this portion of the charge asks the jury to whom Mrs. Berkman thought she was conveying the land. Mrs. Berkman could have thought she was conveying the land to no one but S. K. Fowler, "a nominee of the land bank," for the bank's lawyer had so written to her attorney. (R. 33; 34.) Ferguson, however, uncontrovertedly testified he had not seen this letter, did not know what language it contained. (R. 416; 417.) He had merely instructed the lawyer as above set out. Why should Ferguson, in this situation, be bound by what Mrs. Berkman thought?

In the next paragraph the judge charges the jury that Fowler held the land in trust for somebody.

In the following paragraph the trial judge tells the jury that Ferguson, as president of the bank, was without power to take anything that was the bank's and name somebody to hold it for him personally, or for his wife.

These are two vicious paragraphs.

If Fowler held the land in trust for somebody, and Ferguson was without power to name somebody to hold it for himself or for his wife (which he testified he did), then Fowler must hold it in trust for the bank. The jury could only have so understood—the charge giving what purportedly was the law in effect instructed them to find the defendant guilty.

In the third paragraph the trial court uses this language: Ferguson "was without power to take *anything that was the bank's* . . . " Of course Ferguson could not have taken anything that was the bank's and name somebody to hold it in trust for himself or wife. *Abstractly*, there is no evil in such charge. But the Berkman land, before Mrs. Berkman conveyed it, was not "anything that was the bank's." Consequently, without apparent reason, the trial judge in the preceding sentence said Fowler held the thing in trust for somebody—meaning the property Mrs. Berkman conveyed to him, then in the next breath, without distinguishing, made the statement that Ferguson was without power to take anything that was the bank's and name somebody as trustee to hold for him or his wife. The jury could only have understood that the judge was telling them that Ferguson was without power to name Fowler as trustee of *the land* for himself or wife.

At another place in his charge the trial judge again answered the issue:

"One acting as President of a bank is not at liberty to deal with the property of the bank as though it were his own. It is his duty to keep in mind always the financial or pecuniary interests of the stockholders of such institution, or those for whom he acts, and in the exercise of this duty he should give the bank's interests preference over his personal interest, wherever there should be a conflict, or he should refuse to act at all.

"And if the President of a bank fails in the performance of this duty, and uses opportunities that come before him to appropriate the proceeds of property rightfully belonging to the bank, then the bank, acting through its directors and stockholders could, at its election, hold the President liable in equity for any profit he made in thus dealing personally in a matter in which he should have dealt for the bank alone.

"You are instructed in this connection that if the defendant Ferguson, knowing or believing that the Berkman land would probably result in yielding a profit over and above the indebtedness, caused it to be handled in the name of Fowler for the purpose of realizing this profit personally, and diverting it to his wife rather than the bank, and that the use of Fowler's name and the manner in which the transaction was handled was intended only as a subterfuge, then the defendant Ferguson, when he received profit from such property would be guilty of abstracting the same from the bank.

"On the other hand, if it was placed in Fowler's name for Mrs. Ferguson in good faith, and handled

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as a bona fide transaction, and not as a subterfuge, it would not be an act of abstracting money from the bank.

"So if you find and believe beyond a reasonable doubt in the language of the indictment that the defendant did, within the jurisdiction of this Court, unlawfully, wilfully, knowingly and feloniously abstract and convert to his own use and benefit certain funds and moneys belonging to the bank, as charged in the several counts of this indictment, you will find the defendant guilty; or if you have a reasonable doubt as to such guilt, then you will acquit and find him not guilty." (R. 468; 469)

The first two paragraphs of this portion of the charge "build the jury up" for the capper, the third paragraph. The short fourth paragraph tersely states the possible alternative of the instruction of "find guilty" contained in the first three paragraphs.

In the first two paragraphs the trial judge dissertates upon liability of the president of a bank for using opportunities that come before him to appropriate property rightfully belonging to the bank. Here again, *abstractly* this may be the law, but the jury is bound to have understood from the language used that the trial court thought Ferguson appropriated property rightfully belonging to the bank. Whether the property—the Berkman land—belonged to the bank was really the question to be decided.

Assuming that the president had appropriated moneys of the bank rightfully belonging to the bank, then the answer of the question in the next paragraph is clear—

guilty. Of course, the transaction was handled as a subterfuge if the president of the bank failed in the performance of his duty and used opportunities that came before him to appropriate *proceeds* of property rightfully belonging to the bank. The incorrect premise is that *the property* belonged to the bank.

In still another place, at the very outset of his charge, the trial judge prejudicially and erroneously commented on the only vital issue of the case—for whom did Fowler hold title?

> "In that situation she (Mrs. Berkman) offered to give the bank the land and $1,000.00 besides, if they would release her of the debt.
>
> "The evidence shows, or tends to show, that the defendant, Ferguson, considered the land a fairly good prospect, and accepted the proposition, and accepted it in this form: That instead of conveying the land directly to the bank, it was to be conveyed to a person to be named by the bank, called a nominee. That nominee was S. K. Fowler." (R. 463)

Note that the trial judge states that Mrs. Berkman "*offered to give the bank the land,*" then further states that *Ferguson "accepted the proposition,* and accepted it in this form: That instead of conveying the land directly to the bank, it was to be conveyed to a person named by the bank, called a nominee."

If such language in the court's charge to the jury did not tell the jury straight out that Fowler held the land for the bank, then petitioner believes our language lacks adequate expression for such a thought.

In discussing this grievous error the government lightly disposes of petitioner's complaint that the jury, in the second trial just as in the first trial, were told in effect that Fowler took for the bank and not for Ferguson. (Br. p. 10) The government uses this simple language: "* * * the jury were simply told that the land 'was to be conveyed to a person to be named by the bank, called a nominee' (R. 463), *a fact which petitioner does not dispute.*" (Italics ours)

Petitioner does dispute this fact, has always disputed it, and will forever dispute it. The important thing, however, is that the *trial court did not permit defendant in either trial to dispute it.*

The only testimony that the land was to be conveyed "to a person named by the bank" was that of the bank's lawyer and a letter written by him, which Ferguson never saw nor authorized and which should not be binding on Ferguson. Ferguson and Pope testified otherwise. An issue was clearly presented.

But the trial court's error was more insidious than the government's brief indicates. As shown from the charge quoted above the trial court actually stated that Ferguson *accepted* Mrs. Berkman's proposition *to deed the land to the bank.*

Consequently, by direct comment, as above, by innuendo, by erroneous legal reasoning, by lengthy statements upon the government's side of the case, the trial court in

both cases not only in effect, but actually, told both juries that Fowler held the property for the bank. This being so of course the juries found the defendant guilty. For defendant never denied having received for his wife the proceeds from her investment. The issue as to who told the truth, Ferguson, the bank's president or its discharged lawyer, McCombs, never reached the jury. The issue whether the land was deeded to the bank or to Mrs. Ferguson through Fowler was decided by the trial judge. He told the jury that Ferguson accepted Mrs. Berkman's proposition to deed it to the bank.

And also that Ferguson was *without power* to name Fowler to hold it for him personally or for his wife. Under the Federal Farm Loan Act Ferguson, President of a Joint Stock Land Bank, did have the power to name Fowler to hold title to the land. This contrary instruction of the trial judge was an erroneous construction of this Federal Act and this Court should correct this very prejudicial error.

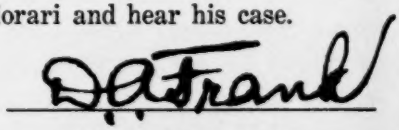
The government points out that clearly such instructions were not "pronouncements from the Bench that he was guilty of abstracting money from the Bank," and that the jury were properly informed that they were the sole judges of the facts (Br. 12). The answer to such an argument is clear in a criminal case. The situation is like that of libel—once the libel has been made, repudiations seldom cure the harm done.

In this case the judge made pronouncements in his charge that not only lead to the belief of guilt, but answered for the jury the only issue upon which guilt or innocence hung. He could not cure this evil by declaring that the jury were the sole judges of the facts.

CONCLUSION

Petitioner believes that he did not have a fair trial and that it is important, perhaps primarily to himself, but also to this court and our country that justice be done him.

He therefore prays respectfully that this court grant his petition for Writ of Certiorari and hear his case.



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